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NO.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1983

WILLIAM KEENE, DENNIS R. HATCHER,
KEN E. DAMPIER and RICHARD COLLINS,

Petitioners,

versus

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

WHETHER THE DECISION BELOW, WHICH AFFIRMED A TRIAL COURT'S DENIAL OF A MOTION TO SUPPRESS EVIDENCE, IS CONTRARY TO PREVAILING PRECEDENT AND CONSTITUTIONAL PRINCIPLES WHERE IT APPROVED AN ARREST, SEARCH AND SEIZURE OUTSIDE THE TERRITORIAL ENFORCEMENT AUTHORITY OF LAW ENFORCEMENT OFFICERS BASED ON THE CITIZEN'S ARREST THEORY?

LIST OF INTERESTED PERSONS

The only persons having an interest in the outcome of this case are the Petitioners, their families, and the United States of America.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioners, WILLIAM KEENE, DENNIS R. HATCHER, KEN E. DAMPIER and RICHARD COLLINS, respectfully pray that a Writ of Certiorari issue to review the judgment, opinion, and order on rehearing of the United States Court of Appeals for the Eleventh Circuit entered in Case No. 81-6119 on July 5, 1983, and

August 29, 1983, which affirmed the judgment of the United States District Court for the Southern District of Florida.

OPINIONS BELOW

The United States District Court for the Southern District of Florida announced its opinion denying a defense motion to suppress physical evidence in United States v. Collins, 523 F.Supp. 239 (S.D. Fla. 1981). That opinion is reproduced in the Appendix. On direct appeal, the United States Court of Appeals for the Eleventh Circuit entered its per curiam affirmance without citation of authority. United States v. Keene, 710 F.2d 838 (11th Cir. 1983). A petition for panel rehearing was denied by the court on August 29, 1983. Those orders are reproduced in the Appendix.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). This petition is filed within the authorized time period following the Eleventh Circuit's order on rehearing as extended by the order of Justice Lewis F. Powell in Application No. A-318.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Art. I, §8:

> The Congress shall have the power...

Clause 10:

> To define and punish piracies and felonies committed on the high seas, and offenses against the law of nations;

Clause 11:

> To declare war, grant letters of marque and reprisal, and make rules governing captures on land and water;

U.S. Constitution, Amendment V:

> No person shall...be deprived of life, liberty, or property without due process of law...

21 U.S.C. §955a:

> (a) It is unlawful for any person on board a vessel of the United States, or on board a vessel subject to the jurisdiction of the United States on the high seas, to knowingly or intentionally manufacture or distribute, or to possess with intent to manufacture or distribute, a controlled substance.

21 U.S.C. §955c:

> Any person who attempts or conspires to commit any offense defined in sections 955a to 955d of this title is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

STATEMENT OF THE CASE

Petitioners were convicted in the United States District Court for the Southern District of Florida of conspiracy to possess and possession with intent to distribute marijuana while on board a United States vessel contrary to 21 U.S.C. §§955a and 955c. Prior to trial, Petitioners sought suppression of the evidence seized by the Florida Marine Patrol while the Petitioners were situated on their commercial crabbing vessel, the McRich. The law enforcement purpose of the Florida Marine Patrol at the time of the seizure was to patrol and enforce the shrimper/crabber line of demarcation along the west coast of Florida pursuant to applicable fisheries regulations. This imaginary line runs along a point from eight to thirty miles offshore.

During that patrol on the

evening of February 5, 1981, while outside the territorial waters of the State of Florida, the Florida Marine Patrol observed two radar blips which indicated that two vessels were entering the shrimper/crabber zone. The Florida Marine Patrol approached the area of the two vessels and succeeded in stopping one vessel at a point approximately twelve to fourteen miles offshore. That vessel was found to be carrying a cargo of marijuana.

The Florida Marine Patrol then commenced pursuit of the second vessel, the McRich, and successfully stopped the boat with the aid of a spotlight, blue law enforcement light and a shotgun blast directed at the McRich. In addition to carrying Petitioners, the McRich also carried a cargo of marijuana.

During a pre-trial hearing,

Petitioners sought suppression of the evidence on the basis that the law enforcement seizure was effected by Florida police officers who were acting outside the territorial boundaries of their law enforcement authority. In denying suppression of the evidence, the district judge concluded that Petitioners failed to establish a legitimate expectation of privacy, that the seizure of evidence was the direct result of a plain view observation of marijuana, and that the ensuing arrests were valid as citizen's arrests. The appellate court affirmed this ruling.

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW AFFIRMING THE DENIAL OF PETITIONERS' MOTION TO SUPPRESS IS CONTRARY TO PREVAILING LAW AND RESULTS IN A DEPRIVATION OF CONSTITUTIONAL RIGHTS WHERE IT PERMITS LAW ENFORCEMENT OFFICERS TO CONDUCT SEARCHES, SEIZURES AND ARRESTS UNDER COLOR OF AUTHORITY OUTSIDE

THEIR TERRITORIAL BOUNDARIES IN THE ABSENCE OF HOT PURSUIT UNDER A THEORY OF CITIZEN'S ARREST.

Law enforcement officers of any sovereign, whether state or federal, do not possess any general authority to investigate suspected criminal conduct or enforce laws. Rather, all law enforcement officers are bound by the express statutory authority which governs and permits their conduct. See United States v. Ramsey, 431 U.S. 606, 97 S.Ct. 1972 (1977); United States v. Williams, 617 F.2d 1063, 1073-1075 (en banc) (5th Cir. 1980). At issue in the present case is the breadth of authority conferred upon members of the Florida Marine Patrol by applicable Florida law. According to §370.021(5), Florida Statutes (1981), the authority of the Florida Marine Patrol is carefully limited:

> ...Such conservation officers, together with the executive director, and the director of the Division of Law Enforcement, are constituted law enforcement officers of this State with full power to investigate and arrest for any violation of the laws of this State and the rules and regulations of the department under their jurisdiction and for violations of chapter 253 and the rules and regulations promulgated thereunder. The general laws applicable to arrests by peace officers of this state shall also be applicable to such law enforcement officers. Such law enforcement officers may enter upon any land or waters of the State for performance of their lawful duties and may take with them any necessary equipment, and such entry shall not constitute a trespass.

That same statute, moreover, limits the jurisdiction of the Florida Marine Patrol to Florida waters:

> Such law enforcement officers shall have the authority, without warrant, to board, inspect, and search any boat, fishing appliance, storage or processing plant, fish house, sponge house, oyster house, or any other warehouse, building or vehicle engaged in

> transporting or storing any fish or fishery products. Such authority to inspect without a search warrant is limited to those cases in which such law enforcement officers have reason to believe that fish or any salt water products are taken or kept for sale, barter, transportation, or other purposes in violation of laws or rules promulgated under this law. Any such law enforcement officer may at any time seize or take possession of any salt water products or contraband which have been unlawfully caught, taken, or processed or which are unlawfully possessed or transported in violation of any of the laws of this State or any rule or regulation of the Department.

Given this statutory limitation, which in turn acts as the basic guide for the constitutional constraint on a law enforcement officer's actions, there can be no doubt that the Florida Marine Patrol officers involved in this case had absolutely no jurisidiction to operate as the Florida Marine Patrol outside Florida's territorial waters at the precise

location where Petitioners were subjected to the search, seizure and arrest. Because the lower courts in the present case have effectively approved the ultra vires exercise of authority by law enforcement officers who have neither statutory nor constitutional justification for their actions, this case is ripe for scrutiny by this Court.

A proper analytical framework for review of such claims of ultra vires police action begins with an inquiry into whether the law enforcement action is justified on any express or implied statutory basis. Because "state action" is involved whenever police activity is questioned, there must exist some recognized authority to support all police action. This legal framework is precisely that utilized by the Fifth Circuit in United States v. Garcia, 676 F.2d 1086 (5th Cir. 1982), involving a

contention that investigating and arresting officers -- game wardens -- had no statutory authority to make an arrest outside state park lands for any offense except game law violations. The game wardens in Garcia stopped the defendants' trucks which had been observed driving without lights at night through a private pasture on a private ranch road. The game wardens subsequently seized contraband as a result of the stop. The defendants claimed that the officers acted in excess of their authority.

The Fifth Circuit agreed. The court first recognized that "the law enforcement authority of game wardens is limited both geographically and functionally." Id. at 1090. Because none of the events leading to the arrests occurred in a state park, the wardens had no legal ability to stop the

trucks and arrest the occupants:

> When Huff spotted the tanker-truck being driven along a private ranch road on the Rosa property without lights, he thought that criminal activity might be afoot. He did not, however, suspect that the truck was in any way connected with or involved in violations of the gaming laws. Rather, he was concerned that the truck might either be stolen or carrying a load of marijuana. It was on this basis, and this basis alone, that Huff stopped the truck, arrested Mungia, and searched the tanker-trailer. Huff, as a game warden commissioned by the Parks and Wildlife Department, had no authority to stop this or any other vehicle outside of state park grounds for any reason other than suspected violations of the gaming laws. Because the stop of the tanker-truck and the arrest of Mungia were in no way connected with actual or suspected gaming law violations, the stop and arrest were illegal.

The Fifth Circuit approach in Garcia is the same method utilized by other courts, all of which run contrary to the decision in this case. United States v. Soto-Soto, 598 F.2d 545 (9th

Cir. 1979), for example, involved a single FBI agent conducting a border search which resulted in the discovery of contraband. After canvassing the statutory provisions governing Customs border searches and examining the judicial decisions regarding those statutes, the Ninth Circuit concluded that the FBI agent had neither express nor implied authority to conduct a border search. Neither could the search be justified as general law enforcement activity in the area of the border. The Court then quoted from its earlier decision in Alexander v. United States, 362 F.2d 379, 381 (9th Cir.), cert.denied, 385 U.S. 977, 87 S.Ct. 519 (1966):

> In conferring upon customs officers such broad authority, circumscribed only by constitutional limitations of the Fourth Amendment, the Congress has in effect declared that a search which would be

> 'unreasonable' within the meaning of the Fourth Amendment, if conducted by police officers in the ordinary case, would be a reasonable search if conducted by Customs officials in lawful pursuit of unlawful imports. Judicial recognition of this distinction has given rise to the term 'border search', in order to distinguish official searches which are reasonable because made solely in the enforcement of Customs laws from other official searches made in connection with general law enforcement.

As a result, the evidence seized by the FBI in the absence of statutory authority for the agent to act in the manner he did was ordered suppressed.

The Fifth Circuit examined a situation involving possible joint activity on the part of various law enforcement officers in United States v. Guillen-Linares, 636 F.2d 78 (5th Cir. 1981). There, members of the Coast Guard stopped and boarded a vessel and conducted a documents and manifest

check. Because the record was initially inadequate, the court first remanded the case to determine whether the Coast Guard boarded as agents of the Customs Service. If so, then the Coast Guard was bound by the express statutory limitations applicable to Customs officers. During the remand proceedings, the trial judge concluded that the stopping and boarding of the boat was carried out by the Customs Service. After the remand, the Fifth Circuit concluded that because a Customs stop was involved, and because the law enforcement officers had no reason upon which to conduct a border search and had no reasonable suspicion of a violation of law, the stop and seizure was illegal.

Although the pertinent facts in the instant case are analogous, the initial and appellate courts took a

totally contradictory approach. Instead of condemning the ultra vires exercise of authority, the courts concluded that the Florida Marine Patrol could act as "private citizens" to validate that which they could not do as law enforcement officers. This was done notwithstanding that these officers were piloting a Florida Marine Patrol vessel, dressed in full Marine Patrol uniform, identified themselves as Florida Marine Patrol members, and possessed numerous other incidents of apparent law enforcement authority. By approving this "mere citizen" charade and thereby validating the police conduct, the court below directly conflicted with the decisions of United States v. Ible, 630 F.2d 389 (5th Cir. 1980), and United States v. Brown, 551 F.2d 639 (5th Cir. 1977), both of which represent the prevailing rule that a policeman cannot

act as a mere citizen when he is attempting to act under color of office.

The decision below greatly expands the law enforcement authority throughout this nation by permitting the unchecked intrusion of police officers who are permitted to assume the role of mere citizens whenever they act in excess of their lawful authority. The decision in this case is constitutionally offensive in the sense that it could easily lead to a judicial establishment of a national police force consisting of the members of every law enforcement agency; this national police organization, under the decision of the courts below, would then be empowered to travel the world over, including the high seas, investigating perceived violations of law and arresting those deemed to have committed any such violation. The precedent established by

a case such as this is dangerous. This Court must take this opportunity to address this question in order to guarantee the prevailing constitutional limitations on law enforcement excesses.

CONCLUSION

For the above stated reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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APPENDIX

UNITED STATES of America, Plaintiff,

v.

Richard COLLINS, Dennis R. Hatcher, Ken E. Dampier, and William Keene, Defendants.

No. 81-262-Cr-SMA.

United States District Court, S. D. Florida, Miami Division.

Sept. 21, 1981.

On defendants' motion to suppress bales of marijuana seized from their vessel, the District Court, Aronovitz, J., held that: (1) defendants failed to establish requisite legitimate expectations of privacy in area searched in order to raise the Fourth Amendment challenge to admission of the evidence, which was seen in "plain view" on deck of their vessel; (2) in fact, no "search" was made by the officers at time of arrest; and (3) defendants' arrests were not illegal.

Motion denied.

ORDER DENYING DEFENDANTS' MOTION TO SUPPRESS

ARONOVITZ, District Judge.

THIS MATTER was heard by the Court in an evidentiary hearing upon the Defendants' Motion to Suppress the physical evidence seized from aboard the M/V McRICH at the time the four Defendants were arrested. Defendants assert that the arresting officers had no jurisdiction or authority to make the stop and search of the American flag vessel or to arrest them. A two count indictment charges Defendants with possession with intent to distribute a quantity of marijuana and with conspiracy to possess with intent to distribute a quantity of marijuana, in violation of 21 U.S.C. §§955a(a) and 955(c). The Court, having considered the testimony and other evidence adduced

at the hearing, having heard oral argument from counsel, having considered the respective memoranda of law and being otherwise fully advised in the premises, makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

On February 25, 1981, Florida Marine Patrol (FMP) Officers Mike Minski and Andy Brown, along with Officer Ronald Dearmin of the National Oceanic and Atmospheric Administration, United States Department of Commerce, were patrolling off the west coast of Florida near Everglades City, Florida (Collier County) aboard the 50 foot Florida Marine Patrol vessel ORION within a fisheries conservation zone along a line of demarcation between designated stone crab bed areas and authorized shrimping areas as established by the Department

of Commerce. The purpose of the officers' presence in the area was to enforce federal regulations prohibiting shrimping vessels from casting their trolling nets within the stone crab bed area. The line of demarcation runs along the west coast of Southern Florida at distances from the shore varying up to 200 miles. 50 C.F.R. §654.23(a).

At approximately 6:00 that night two contacts were picked up on the ORION'S radar which appeared to be shrimping vessels crossing into the stone crab bed area. The ORION weighed anchor and proceeded to intercept the vessels to determine if they were engaging in illegal shrimping activity. At the time the vessels were first spotted on radar they were approximately 18 miles from shore traveling in a northeasterly direction toward Everglades City, Florida. When

the ORION, running wihout lights, approached the two vessels, Officer Minski turned the ORION'S spotlight on one of the vessels, later determined to be the MISS JILL II, and observed burlap wrapped bales stacked on her deck. At this point, the MISS JILL II veered away while the other vessel continued on its previous couse. The ORION pursued the MISS JILL II and after a short chase effected a stop, and arrested her four occupants at about 10:00 P.M. Three of these individuals were transferred to the ORION while the fourth, the captain, was left on board the MISS JILL II along with Officer Brown.

Thereafter, the ORION proceeded after the other vessel which had been traveling with the MISS JILL II. During the course of stopping and securing the MISS JILL II the other vessel had gone off the radar, so the

ORION proceeded in the direction that vessel had been headed when last seen. The ORION first ran down a contact which turned out to be a sailboat. The ORION then began pursuing a second contact. As it closed to within 25-50 feet of the vessel, Officer Minski turned his spotlight on the vessel revealing burlap wrapped bales stacked in the open cabin up to the roof and on the work deck. The vessel bore on its stern the name "McRICH" and listed its home port as Everglades City, Florida. Officer Minski turned on his blue revolving light, identified himself over the loud hailer as a FMP officer and ordered the McRICH to stop at about 11:00 P.M. The McRICH first attempted to elude the ORION by increasing its speed and by making evasive maneuvers, but finally stopped when Officer Dearmin fired a shotgun blast over the vessel. The

ORION was then brought alongside the McRICH and Officer Minski ordered the five occupants of the McRICH, which included these four Defendants, to come aboard the ORION. The McRICH was tied to the ORION and take in tow. After rendezvousing with Officer Brown and the MISS JILL II, the vessels proceeded to Key West. At no time did Officer Minski or Officer Dearmin actually board the McRICH prior to landing in Key West.

Officer Minski testified that the McRICH was stopped 5 1/2 to 6 miles off the Florida coast. This testimony was based upon his recollection of the distance indicated by the radar readings of the shoreline at the time of the arrest. However, the log of his radio transmissions during the course of this incident contains Loran coordinates which indicate that the McRICH was stopped well outside Florida territorial

waters. Officer Minski further testified, however, that because of distance and adverse atmospheric conditions that night, he was unable to establish direct radio communications between the ORION and her home base in Naples, Florida. He was able to contact the FMP station at Key West which then relayed his messages to Naples. Under these circumstances, it is very likely that there was an error made in relaying or recording the Loran coordinates, which are expressed as two sets of a series of six numbers. In fact, Officer Minski testified that the relayed position plotted pursuant to the Loran coordinates contained in the radio log was nowhere near the area where the arrest was made. This Court concludes that Officer Minski's independent recollection of his position based on his radar observations is the more

credible evidence of how far from the shore they were at the time the McRICH was stopped. This finding is made after careful evaluation of the witness' manner of testifying, his apparent candor, and his first-hand knowledge of the facts.

CONCLUSIONS OF LAW

Defendants argue the marijuana seized aboard the McRICH should be suppressed because at the time of the arrest the officers were outside of Florida's territorial waters and therefore had no authority or jurisdiction to stop and search the vessel or to make an arrest. It is not clear whether Defendants contend the evidence should be suppressed as the result of an illegal search or as the "fruit" of an illegal arrest, however it is the conclusion of this Court that

neither theory entitles the Defendants to the relief sought.

Addressing first the question of an illegal search, this Court concludes that Defendants have failed to establish the requisite legitimate expectations of privacy in the area searched in order to raise a Fourth Amendment challenge to admission of the evidence. United States v. Salvucci, 448 U.S. 83, 100 S.Ct. 2547, 65 L.Ed.2d 619 (1980); Rawlings v. Kentucky, 448 U.S. 98, 100 S.Ct. 2556, 65 L.Ed.2d 633 (1980); Rakas v. Illinois, 483 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978). There was no testimony that any of the Defendants had owned, leased or chartered the vessel or had any other proprietary interest therein. Moreover, the marijuana bales were not located in any area of the vessel which could be considered private as to any individual,

but rather, were stacked out in the open on the McRICH'S work deck and in her wheelhouse. "There can be no legitimate expectation of privacy in those areas of a commercial vessel which are subject to the common access of those legitimately aboard the vessel." United States v. DeWeese, 632 F.2d 1267, 1271 (5th Cir. 1980).

Even if Defendants were able to establish a legitimate expectation of privacy, it is clear that the search of the vessel could in no way be characterized as illegal. Defendants acknowledge that pursuant to 14 U.S.C. §89(a) or 19 U.S.C. §1581(a), Coast Guard or Customs officers , respectively, could have stopped and boarded the McRICH in either United States or international waters. Defendants assert, however, that FMP or Department of Commerce officers have no

authority to exercise those broad powers exclusively vested by Congress in the Coast Guard and Customs Service, citing United States v. Thompson, 475 F.2d 1359 (5th Cir. 1973), and therefore possessed no authority to stop and search the McRICH in international waters.

Although recognizing the nature of the question raised, this Court has found that the McRICH was stopped within Florida's territorial waters and not in international waters as Defendants suggest. Article II, section 1(a), of the Florida Constitution provides that the state boundary lies three marine leagues, or approximately nine geographic miles, seaward of the Gulf of Mexico coastline, as originally established by the Florida Constitution of 1885. This would include the area where the McRICH was stopped. Defendants contend that

Florida only has sovereignty, including general law enforcement authority, up to three geographic miles from the coast and that in the area extending from three to nine geographic miles Florida has only limited jurisdiction over natural resources in the sea bed, see, 43 U.S.C. §1331, and concurrent jurisdiction with the United States as to fisheries matters. See United States v. Florida, 425 U.S. 791, 96 S.Ct. 1840, 48 L.Ed.2d 388 (1976); United States v. Florida, 420 U.S. 531, 95 S.Ct. 1162, 43 L.Ed.2d 375 (1975). However, the Florida Constitution makes no such distinction, nor would recognition of Florida sovereignty for purposes of general law enforcement in the area from three to six miles off the Gulf Coast be inconsistent with United States or international law, particularly where, as here, Defendants are all citizens of

Florida. In Skirotes v. Florida, 313 U.S. 69, 61 S.Ct. 924, 85 L.Ed. 1193 (1941), the Supreme Court upheld the Appellant's conviction for using diving equipment in the taking of sponges from the Gulf of Mexico "at a point approximately two marine leagues [six geographic miles]" from the Florida coast, in violation of Florida law. Id. at 70-71, 71 S.Ct. at 926. There too, Appellant argued that the criminal jurisdiction of Florida could not extend beyond a three mile limit recognized as the international boundary of the United States, and that the state boundary as fixed by the Florida Constitution violated the Constitution and treaties of the United States. Id. at 71, 61 S.Ct. at 926. Because Appellant was a Florida citizen whose prosecution involved only domestic rights and duties rather than questions of international

relations, arguments based on the territorial limits of United States waters were regarded as irrelevant. Noting that "there is nothing novel in the doctrine that a State may exercise its authority over its citizens on the high seas," the Court concluded "...we see no reason why the State of Florida may not likewise govern the conduct of its citizens upon the high seas with respect to matters in which the State has a legitimate interest and where there is no conflict with acts of Congress." Id. at 77, 61 S.Ct. at 929. For the same reason, Appellant was not considered to be in a position to invoke the rights of foreign citizens or governments pursuant to international treaties. Similarly, in the instant matter, Defendants are Florida citizens whose prosecutions involve purely domestic concerns in which the State of

Florida certainly has a legitimate interest: the curtailment of the entry of marijuana into the state. No conflict with international law or relations nor with any act of Congress has been shown. In fact, as evidenced by this prosecution, the state involvement here has been in furtherance of the laws of the United States. Therefore, Florida was entitled to exercise its criminal jurisdiction, under the circumstances of this case, to the full extent of its boundaries as defined by the Florida Constitution.

There is another, and more basic, reaosn why the officers' actions cannot be characterized as an illegal search: in fact, no "search" was made by the officers at the time of arrest. The marijuana bales were sitting in the open on the McRICH'S deck, in plain view of the officers aboard the ORION, under

the illumination of her spotlight. No search of the vessel was required to discover the marijuana, and, in fact, the uncontroverted testimony established that neither Officer Minski nor Officer Dearmin even boarded the McRICH until after she had been towed to Key West. This also disposes of the Defendants' arguments that neither officer was authorized to exercise the more expansive statutory search powers provided by 14 U.S.C. §89(a) or 19 U.S.C. §1581(a) to the Coast Guard and Customs Service, respectively. Because the marijuana was in plain view, the officers had no need to, nor did they in fact, exercise these special statutory powers to search vessels on the high seas. The plain view sighting of the marijuana bales and the McRICH'S attempt at flight after Officer Minski identified himself were more than

sufficient probable cause to stop and seize the McRICH.

As previously noted, Defendants also argue that the evidence should be suppressed as the "fruit" of an illegal arrest because the officers were acting outside their jurisdiction. As discussed supra, it is the conclusion of this Court that the State does possess general law enforcement authority, under these circumstances, within the boundaries defined by the Florida Constitution. Inasmuch as there was also sufficient probable cause to make the arrest, this contention has no merit. Furthermore, under Ker v. Illinois, 119 U.S. 436, 7 S.Ct. 225, 30 L.Ed. 421 (1886), and Frisbie v. Collins, 342 U.S. 519, 72 S.Ct. 509, 96 L.Ed. 541 (1952), and their progeny, Defendants may not challenge this Court's jurisdiction over

their persons on the grounds that their presence was unlawfully secured. See United States v. Cadena, 585 F.2d 1252 (5th Cir. 1978); United States v. Winter, 509 F.2d 975 (5th Cir. 1975). Cf. United States v. Toscanino, 500 F.2d 267 (2d Cir. 1974).

However, even if the officers were acting outside their jurisdiction, the arrest would still be valid. Generally, where a law enforcement officer makes an arrest outside of his geographic area of jurisdiction he is deemed to be acting as a private citizen and a Federal Court looks to the law of the state in which the arrest occurred to determine if the action can be upheld as a citizen's arrest. United States v. Ible, 630 F.2d 389 (5th Cir. 1980); United States v. Brown, 551 F.2d 639 (5th Cir. 1977); United States v. Bishop, 530 F.2d 1156 (5th Cir. 1976).

Florida follows the common law rule recognizing the right of a police officer to make a citizen's arrest (1) where a felony is committed in his presence or (2) when a felony has actually been committed and the police officer as a citizen reasonably believes, in good faith, that the person to be arrested has committed the felony. Ible at 393. Of course, if this arrest is deemed to have been made outside state boundaries, Florida law would not be controlling. Where, as here, however, there is no specific federal law to govern this situation, a federal court may resort to and apply the common law. United States v. Crain, 589 F.2d 996 (9th Cir. 1979); United States v. Best, 573 F.2d 1095 (9th Cir. 1978). Applying the common law rule to the facts of this case it is clear that the arrest was valid and lawful as a

citizen's arrest. Upon approaching the McRICH and turning their spotlight on the vessel the officers immediately saw the bales of marijuana on deck and the home port designation of Everglades City, Florida, establishing the commission of a felony in the officers' presence. Thus, there is no basis for suppression of the evidence on the theory of an illegal arrest.

CONCLUSION

In conclusion, it is the opinion of this court that Defendants did not possess the requisite legitimate expectations of privacy in the area searched to raise a Fourth Amendment challenge to the introduction of the evidence seized from aboard the McRICH. In any event, however, no illegal search of the McRICH was made by the arresting offficers inasmuch as

the marijuana bales were in plain view of the officers aboard the ORION as they approached the McRICH and therefore, no "search" was made. Nor can the arrest of the Defendants by FMP officers at a point approximately six miles off the west coast of Florida be considered illegal. Florida may properly exercise its general law enforcement authority over its citizens to the full extent of its territorial boundaries, as defined by the Florida Constitution, where there is no conflict with international law or relations or with any act of Congress. Alternatively, if the arrest is considered to have been made outside the officers' jurisdiction, the arrest is valid as a common law citizen's arrest. Accordingly, it is

ORDERED AND ADJUDGED that Defendants' Motion to Suppress be, and the same hereby is, DENIED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 81-6119

D.C. Docket No. 81-262-Cr-SMA

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

WILLIAM KEENE,
DENNIS R. HATCHER,
KEN E. DAMPIER, and
RICHARD COLLINS,

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Florida

(July 5, 1983)

Before TJOFLAT, VANCE and CLARK, Circuit Judges.

PER CURIAM:

AFFIRMED. See Cir. R. 25.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 81-6119

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

WILLIAM KEENE, DENNIS R. HATCHER,
KEN E. DAMPIER, RICHARD COLLINS,

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Florida

ON PETITION FOR REHEARING

(August 29, 1983)

Before TJOFLAT, VANCE and CLARK, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

Office - Supreme Court, U.S.
FILED
MAR 7 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-946

In the Supreme Court of the United States

OCTOBER TERM, 1983

WILLIAM KEENE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
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In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-946

WILLIAM KEENE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that Florida Marine Patrol officers lacked authority to arrest them and search their marijuana-laden vessel because the vessel was allegedly discovered outside the territorial waters of the State of Florida.

1. After a bench trial in the United States District Court for the Southern District of Florida, petitioners were convicted of possessing marijuana on board a vessel of the United States with intent to distribute it, in violation of 21 U.S.C. 955a.[1] Petitioner Keene was sentenced to 18 months'

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[1] Petitioners also were charged in a conspiracy count under 21 U.S.C. 955c, but the parties agreed to hold a trial on stipulated facts on the substantive count only. After the district court convicted petitioners on that count, the conspiracy count was dismissed. Co-defendant Luis Ignacio Cardozo failed to appear for arraignment and was not tried with petitioners.

imprisonment, all but six months of which were suspended, to be followed by a two-year special parole term. Petitioners Collins, Dampier, and Hatcher each were sentenced to 30 months' imprisonment, to be followed by two-year special parole terms. The court of appeals affirmed (Pet. App. A23).

a. The evidence, which is not in dispute, showed that in February 1981 petitioners attempted to smuggle approximately 11,000 pounds of marijuana into this country. Their scheme was frustrated when Florida Marine Patrol officers discovered their vessel and its illicit cargo off the Florida coast.

On the evening of February 25, 1981, the Florida Marine Patrol vessel ORION was on routine patrol in the Gulf of Mexico off the west coast of Florida near Everglades City. The purpose of the patrol was to enforce federal regulations protecting stone crab areas from shrimp fishing. Pet. App. A3-A4. At approximately 6:00 p.m., monitoring of the ORION's radar disclosed two vessels that appeared to be crossing into the protected area, some 18 miles offshore (*id.* at A4).

The ORION turned off its lights and approached the two vessels. When the ORION drew near the two boats, Officer Minski turned the ORION's spotlight on one vessel and saw burlap-wrapped bales stacked in plain view on its deck. That vessel veered away and the ORION gave chase, shortly thereafter effecting a stop and arresting the vessel's four occupants. Pet. App. A4-A5. The ORION then proceeded after the second vessel, which had disappeared from its radar. At approximately 11:00 p.m., the ORION came upon petitioners' crab boat, the McRICH. It too had burlap-wrapped bales stacked in plain view in its cabin and on its work deck. When Officer Minski turned on the patrol boat's blue law enforcement light and identified himself

over a loudspeaker, the McRICH sped away and took evasive maneuvers. It finally stopped when another officer fired a shotgun blast over the boat. *Id.* at A5-A6.

When the McRICH was stopped, it was five and one-half to six miles off the Florida coast (Pet. App. A7-A9). Petitioners were arrested and were taken aboard the ORION, which then towed the McRICH to Key West. Petitioners' boat was neither searched nor boarded until after it had been brought to Key West (*id.* at A7, A17).

b. Prior to trial, petitioners moved to suppress the marijuana discovered on the McRICH. They claimed that the Florida Marine Patrol officers lacked authority to stop and arrest them and to search their vessel. In a thorough opinion (Pet. App. A1-A22), the district court rejected their contentions on four alternative grounds. The court first concluded that petitioners had no legitimate expectation of privacy in the work deck of the McRICH (*id.* at A10-A14). Alternatively, the court held that no search had occurred since the marijuana bales on petitioners' boat were in plain view (*id.* at A16-A17). The court also ruled that, in any event, the officers did have authority under Florida law to stop petitioners' vessel, since the Florida constitution provides that the State's border extends nine miles seaward (*id.* at A11-A16). Finally, the court held that even if the officers exceeded their authority, suppression was not required because petitioners' arrest could be justified as a citizen's arrest (*id.* at A19-A21). The court of appeals affirmed without opinion (*id.* at A23).

2. Petitioners contend (Pet. 8-19) that the Florida officers lacked power to arrest them on the high seas and that the marijuana discovered on their vessel should be suppressed. The Court has recently declined to review identical arguments (*Hernandez* v. *United States*, cert. denied, No. 83-5625 (Jan. 23, 1984)), and there is no reason for a different result here.

Insofar as petitioners argue that Florida officers could not arrest them on the high seas, it is settled that petitioners would not be entitled to relief even if their arrests were unlawful, for a criminal defendant "cannot claim immunity from prosecution simply because his appearance in court was precipitated by an unlawful arrest." *United States* v. *Crews*, 445 U.S. 463, 474 (1980).

To the extent petitioners are claiming that the exclusionary rule should be applied to suppress the marijuana seized from their vessel by the state officers, that claim also must fail. It is settled that federal, not state, law controls the admissibility of evidence in a federal trial, even when the evidence is obtained by state officers who may have violated state law. See *Preston* v. *United States*, 376 U.S. 364, 366 (1964); *Rios* v. *United States*, 364 U.S. 253, 255, 261 (1960); *Elkins* v. *United States*, 364 U.S. 206, 223-224 (1960).[2] Here, the plain view discovery of numerous bales of marijuana stacked on the deck of petitioners' vessel did not even constitute a "search," and thus the state officers' actions did not implicate the Fourth Amendment at all. Cf. *United States* v. *Knotts*, No. 81-1802 (Mar. 2, 1983).[3] The discovery of the marijuana, coupled with petitioners' attempt to

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[2]Petitioners rely (Pet. 11-13) on the Fifth Circuit's decision in *United States* v. *Garcia*, 676 F.2d 1086 (1982), for their contrary argument. They overlook the fact that this Court vacated that decision (*United States* v. *Garcia*, No. 82-1549 (June 20, 1983)). On remand, the court of appeals held that a state officer's arrest powers under state law do not govern the admissibility in federal court of evidence discovered in a search that complies with federal law. *United States* v. *Garcia*, 719 F.2d 108, 109 (5th Cir. 1983).

[3]In addition, the district court also correctly concluded (Pet. App. A10-A11) that petitioners had no legitimate expectation of privacy in the open areas of their vessel where the marijuana was observed in plain view. See *United States* v. *DeWeese*, 632 F.2d 1267, 1271 (5th Cir. 1980).

flee from the officers, undeniably furnished the officers with probable cause to arrest petitioners and to seize the vessel and its contents. Moreover, although the district court concluded that the officers did have authority under state law to arrest petitioners, it also concluded in the alternative that the marine patrol officers possessed common law arrest powers. Thus, petitioners' arrests and the search of their vessel were permissible under both the Fourth Amendment and the common law. In short, petitioners have provided no grounds for reversing their convictions.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

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